have been aware of all the circumstances from which a suspicion of their being accomplices arose and if in spite of knowledge of those circumstances, he believed the witnesses then he was entitled under Section 133 of the Evidence Enactment to convict even though there was no corroboration.

Cur. Adv. Vult.

Murray-Aynsley, J.—In this case the Appellant was unrepresented. The only point that arises from the record is whether certain witnesses for the prosecution were accomplices, and if they were, whether the conviction can stand.

In the present case the witnesses for the prosecution were persons who were engaged on a lorry which according to their story was hired by the Appellant, a watchman on a mine, to convey at the hour of 3 a.m., certain iron piping to the premises of a receiver in Ipoh.

The circumstances are such that I think these persons must have known very well that they were engaged in a dishonest transaction; it does not show that they were thieves equally with the accused, who was charged with the theft of this iron piping.

Certain Indian cases appear to narrow the meaning of the term "accomplice" to a person who is guilty of the same offence as the accused.

I think that this is wrong; I think that the principle on which the rule relating to accomplices is based would make the evidence of an accessory as much subject to suspicion as that of a principal. I think therefore that these persons should have been treated as accomplices. That being so, what is the position of their evidence according to the law in force in the F.M.S.

There are two provisions in the Evidence Enactment on the subject; they are Sections 133 and 114 (b).

The first of these merely re-establishes the undoubted rule of English law. Section 114 (b), I think, was intended to set out the position according to English law as it was understood at the time, but owing to the fact that all the cases in England are cases where trial has been with a jury, the English authorities have resolved themselves into decisions as to what is the proper direction to give to a jury in such cases. The position there is that a warning as to the desirability for corroboration must be given. If the warning is not given or if the jury are directed that something is corroboration when it is not, there is a misdirection. Even if the proper warning is given the Court of Criminal Appeal will scrutinize convictions closely to ascertain if they are justifiable having regard to all the circumstances of the case. In actual practice the warning given is almost universally sufficient to secure the acquittal of an accused person. The practical effect of the present position is that what was formerly a mere rule of practice has become equivalent to a rule of law. Here the application of the rules laid down in the Evidence Enactment is more difficult. Where a case is decided by a Magistrate or Judge without the intervention of a jury any question of direction or warning is inapplicable. I think that in the first case any Court reviewing such a decision should satisfy itself that the Judge or Magistrate considered the matter in the light of the fact that the witnesses were accomplices, and secondly that there were circumstances to justify the conclusion that the accomplice is not "unworthy of credit, unless corroborated in material particulars."

Here, there is nothing in the Grounds of Judgment to suggest that the learned Magistrate considered the question of the desirability for corroboration, nor, I think, is there anything in the facts of the present case which would justify dispensing with it.

In my opinion the conviction should be quashed.

Conviction quashed.

[APPELLATE CRIMINAL JURISDICTION]
MURRAY-AYNSLEY, J.
December 14, 1939.

PUBLIC PROSECUTOR v. JESSA SINGH.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 85 of 1939]

Criminal Procedure—summary trial—close of case for prosecution—prima facie case established—duty of Magistrate.

Where in a summary trial a **prima facie** case has been made out against the accused, it is not competent for the trial Magistrate at the close of the case for the prosecution to acquit the accused. It is not part of the duty of the Court to anticipate possible defences at that stage of the proceedings and then to act as though those defences have been established.

MAGISTRATE'S CRIMINAL APPEAL.

T. V. A. Brodie, Assistant Legal Adviser, for the Public Prosecutor (Appellant). This was purely a question of fact—whether there was a case against the accused. It had been proved that the accused had removed metals on the 19th September 1939 and it had been proved that neither the complainant nor the original owner of the metals had given him permission to do so. His act was *prima facie* theft and called for some explanation from him.

Respondent in person.

Murray-Aynsley, J.—In this case the Magistrate acquitted the respondent at the close of the case for the prosecution. I think he acted prematurely. There was evidence which if unrebutted would have justified a conviction. When the respondent has been heard it is quite possible that a satisfactory explanation may be given; but it is not part of the duty of a Court at an early stage in the proceedings to anticipate possible defences, and then to act as though these defences had been established.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]
MURRAY-AYNSLEY, J.
December 15, 1939.

BABU SINGH v. PUBLIC PROSECUTOR.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 88 of 1939]

Sanitary Boards By-laws, By-law 18 of Part VI C —carrying on trade of dairy-man without licence—conviction—power of Court to order confiscation.

The appellant rode through the streets of Taiping on a bicycle, on the back of which was a large receptacle containing milk. He stopped at a coffee-shop and delivered milk from the receptacle. He had no licence. On a charge of carrying on the trade of a dairyman without licence he was convicted.

Held, that the appellant, notwithstanding the absence of evidence of sale, was a "dairy-man" as defined in By-law 18 of Part VI C made under the Sanitary Boards Enactment (Cap. 137) and was therefore rightly convicted.

Held also, that under section 407 of the Criminal Procedure Code the Magistrate had power to order a confiscation of some of the implements used by the appellant in connection with the offence with which he was charged.

Tan Hoon Swee v. Public Prosecutor (1) not followed.

Case referred to:—

(1) *Tan Hoon Swee v. Public Prosecutor,* 6 F.M.S.L.R. 191.

MAGISTRATE'S CRIMINAL APPEAL.

J. S. Chabra for the Appellant.

T. V. A. Brodie, Assistant Legal Adviser, for the Public Prosecutor (Respondent). "Dairy-man" is defined in By-law 18 of Part VI C (Cap. 137) as a "purveyor or seller of milk or occupier of a dairy and shall include the employees thereof engaged in the distribution or sale of milk." On the evidence before the Magistrate he was entitled to come to the conclusion that a man acting in the way described by witnesses and carrying so large a quantity of milk was "a purveyor or seller of milk" and was carrying this on as a trade. The explanation offered of the admitted delivery of milk to certain witnesses was inconsistent with many facts proved by the prosecution as well as with probability.

As regards the minor point of forfeiture, the case of *Tan Hoon Swee v. Public Prosecutor*[1] is not binding on a F.M.S. Court. The wording of the section as reported in that case differs widely and materially from that in S. 407 (ii) of the Criminal Procedure Code. The decision runs violently counter to the plain words of the Code.

Murray-Aynsley, J.—In this case the appellant was charged with carrying on the trade of a dairy-man without a licence.

It is not disputed that the appellant had no licence. By-law 18 of Part VI C made under Cap. 137 gives a definition of a dairy-man.

In the Court below and before me the main controversy was whether there was evidence of a sale. I do not think that a sale concludes the matter one way or the other.

Here it was proved that the appellant rode through the streets of Taiping on a bicycle, on the back of which was a large receptacle containing milk. He stopped at a coffee shop and delivered milk from this. These receptacles are a common sight in the F.M.S. and are the local equivalent of a milk-float.

The Magistrate not unnaturally disbelieved the appellant when he said that he conveyed the milk in that way for his tea and convicted the appellant. I think that the conviction was right.

A further point arises out of the order for the confiscation of some of the implements used by the appellant. This order was made under Section 407 of the Criminal Procedure Code. It has been contended that this order is *ultra vires;* this contention was based on the Johore case of *Tan Hoon Swee v. Public Prosecutor,*[1]. That case held that the section gives no power of forfeiture but merely regulates the exercise of such power when it is conferred by some other enactment.

I am unable to see anything in the words of the section which should so limit the power of the Magistrate and further such an interpretation seems to be excluded by the final words of sub-section (ii). That authority is not binding on me and I do not follow it.

Appeal dismissed.